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Trusts

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whether the 1937 Washington Host-Guest Statute had repealed the 1933 Washington Host-Guest Statute.

The litigation arose from an accident in which the plaintiff was injured while riding in the defendant's car. The accident had occurred while the car was being driven along a private road. In plaintiff's subsequent negligence action, verdict and judgment were rendered in favor of the defendant upon the ground that the 1933 Host-Guest Statute precluded plaintiff from recovering. Plaintiff appealed, contending (1) the 1937 Host-Guest Statute was applicable only to accidents occurring upon public highways; (2) the 1937 statute impliedly repealed the 1933 statute which admittedly had applied to accidents occurring upon private roads; (3) therefore, no statute conferred upon defendant an immunity from suit.

HELD: Judgment for defendant affirmed. The court reasoned that if the 1937 act *did* apply only to public highway accidents (an issue not decided by the court), then it did not repeal the 1933 act by implication since the 1933 act clearly applied to private road accidents. The 1933 act was not clearly inconsistent with the coverage of the 1937 act. Moreover, the 1937 act did not explicitly repeal the 1933 act. Consequently, the instructions to the jury, which had been based upon the 1933 act, were not erroneous even if plaintiff's construction of the 1937 act were adopted.

This decision presents the possibility that the 1937 Act (as amended by Laws of 1957, c. 132, § 1; RCW 46.08.080) subsequently may be held to apply only to public highway accidents, while the 1933 act applies to private road accidents. The result of such a construction of the two acts would be that the rules concerning immunity *vel non*, and evidence requirements, which are applicable to public highway accidents, would be considerably different from those applicable to private road accidents.

TRUSTS

Resulting Trusts—Purchase Money Paid by Resulting Trustee as Loan to Beneficiary. In *Mading v. McPhaden*[1] the defendant McPhaden, a partner in a money-lending partnership, has been acting as Mading's agent in an attempt to purchase certain real estate. The negotiations had reached an apparent stalemate when, unknown to Mading, the vendors informed McPhaden that the asking price was down $5,000.00. McPhaden immediately bought at the lower price in his own name and reconveyed at a higher price to Mading—keeping the $5,000.00 as "profit." The consideration paid by McPhaden had been in two equal parts: (1) a note from Mading to the vendor, secured by a mortgage on the subject real estate, and (2) a check drawn on McPhaden's partnership account, but held by the court to be part of a loan from McPhaden to Mading. Mading sued to recover the "profit" on theories that included resulting and constructive trusts. On appeal the supreme court, reversing the lower court, held that there had been error in not raising the resulting trust. The conclusion then followed that if Mading became the beneficial owner at the time

[1] 50 Wn.2d 48, 308 P.2d 963 (1957).

the lower price was paid by McPhaden there could be no consideration for his promise to pay more.

It is well settled that where property is taken in the name of a grantee other than the person advancing the consideration, the one in whose name title is taken is a resulting trustee for the person who paid the purchase price in the absence of proof of a contrary intention.[2] A contrary intention may be express or may be implied from a husband-wife or parent-child relationship of the payor and the grantee,[3] in which case a gift is presumed. But in the case at hand the problem presented is the determination of whether or not the resulting trust is raised where the purchase price is advanced as a loan to the eventual cestui.

All of the jurisdictions in which this problem has arisen have accepted the rule that where a transfer of property is made to one person and the purchase price is advanced by him as a loan to another, a resulting trust arises in favor of the latter, but the transferee can hold the property as security for the loan.[4] However, for the rule to obtain it is necessary that the resulting trust grow out of facts existing at the time of the conveyance. Our court has held that no trust can be created by an advance of the purchase money after the purchase has been made by the transferee with his own funds or on his own credit.[5] Under the facts of the *Mading* case it would mean that the borrower must have been under a duty to repay at the moment at which the deed to McPhaden was executed.

Although by raising the resulting trust on these facts the court is recognizing well-established rules of trust law, it is possible that the case could have been decided on the basis of constructive trust. In cases where A directs B to use A's money in purchasing land in the name of A, but B wrongfully uses A's money in purchasing the land in his own name, a constructive trust can be enforced.[6] Thus the nature of the trust raised depends on the intentions of the parties. If it is intended that title be taken in the name of the lender, a resulting trust is raised; if it is intended that title is to be taken in the name

[2] Donaldson v. Greenwood, 40 Wn.2d 238, 242 P.2d 1038 (1952), Walberg v. Mattson, 38 Wn.2d 808, 232 P.2d 827 (1951), Mouser v. O'Sullivan, 22 Wn.2d 543, 156 P.2d 655 (1945), RESTATEMENT, TRUSTS, § 440.

[3] It is to be noted that this rule has been expanded in Washington to include the situation where one standing in loco parentis takes property in the name of his charge Dines v. Hyland, 180 Wash. 455, 40 P.2d 140 (1935).

[4] SCOTT ON TRUSTS, § 448; RESTATEMENT, TRUSTS, § 448.

[5] Carkonen v. Alberts, 196 Wash. 575, 83 P.2d 899, 135 ALR 209 (1938).

[6] SCOTT ON TRUSTS, §§ 440.1, 508.1.

of the borrower but it is taken in the name of the lender, a constructive is raised.

In one Washington case[7] it was established that the respondent entrusted her money to the husband of the appellant's decedent to pay the remainder of the purchase price of property and to obtain the deed *in her name*. The court held that he took title as "trustee" for the respondent, but did not specify whether resulting or constructive. While the headnote labels it a resulting trust, it has been cited as an example of a constructive trust raised to prevent unjust enrichment.[8]

The case at hand gives no clear indication as to whether the parties intended that the title be taken in McPhaden's name or in Mading's. If it could have been found that it was intended that the title be taken in Mading's name the court could have raised a constructive trust. If it was to be taken in McPhaden's name, then the resulting trust seems correct. FRED BRUHN

WILLS AND PROBATE

Objection to Probate of Will at Time of Original Application for Probate. The Washington court in *Gordon v. Seattle-First National Bank*[1] enlarged the possibility of contesting a will in connection with the original application for probate. Mabel C. Gordon died in Seattle on March 1, 1956. Her surviving spouse was appointed administrator of her estate. Decedent's brother on April 10, 1956, filed a petition for probate of decedent's alleged will. In his petition he prayed that the will be admitted to probate, that Seattle-First National Bank be appointed administrator with will annexed, and that letters of administration theretofore issued to Mr. Gordon be revoked.

Decedent's surviving spouse filed objections to the admission of the will to probate. He alleged that Mrs. Gordon was mentally and physically incapable of executing a valid will and that she had been unduly influenced by her brother. He prayed that probate be denied and, in the alternative, that he, as the surviving spouse, be appointed executor by preference.

The trial court denied petitioner's motion to strike these objections. The petitioner then filed an answer specifically denying the objector's

[7] Banks v. Morse, 17 Wn.2d 18, 134 P.2d 952 (1943).
[8] SCOTT ON TRUSTS, § 508.1.

[1] 49 Wn.2d 728, 306 P.2d 739 (1957).